**CHONG SEW JIN, RE: EX P;
BORNEO HOUSING MORTGAGE FINANCE BHD.**

HIGH COURT BORNEO, KOTA KINABALU
SYED AHMAD IDID JC
[BANKRUPTCY NOTICE NO. K. 958 OF 1990]
11 JUNE 1991

BANKRUPTCY: *Bankruptcy notice - Setting aside - Allegation that judgment founded on fraud - Whether negotiations for compromise - No action taken to settle debt - Effect of - Bankruptcy Rules 1969, rr. 92, 95, Form 7.*

On 15 September 1989, the plaintiffs obtained judgment in default of appearance under O. 13 r. 1 of the RHC 1980 against the 1st defendant (judgment debtor). Subsequently, the plaintiffs caused a bankruptcy notice to issue against the judgment debtor; this was served on the judgment debtor on 31 October 1990. In her application to set aside the bankruptcy notice, the judgment debtor contended that the bankruptcy notice was founded on a judgment in default which was procured *ex parte* by the judgment creditor by fraud. She contended that she had entered into negotiations to settle the amount owed and that she had believed that the judgment creditor had agreed to forbear to prosecute their claims against her and her other co-defendant. She also claimed that the default judgment was obtained without her knowledge.

Held:

[1] There was no evidence that the default judgment was based on fraud. The fact that the judgment was obtained without the knowledge of the judgment debtor does not turn a good judgment into one infested with fraud or even with fraudulent intent.

[2] If the applicant fails or refuses or neglects to respond with the information requested, as the judgment debtor had so displayed here, there was delay and if there is delay in approval, it cannot be the approving authority's fault based on such circumstances. The judgment debtor had failed to satisfy r. 95 and Form 7 of the Bankruptcy Rules 1969.

[3] The Court hearing the application to set aside the bankruptcy notice cannot go behind the judgment. In the instant case, the debt remains and the judgment remains good and intact. The judgment debtor has not satisfied the requirements of settling the debt or of having a counter claim.

[Judgment debtor's motion dismissed with costs.]

Cases referred to:
Sovereign General Insurance Sdn. Bhd. v. Koh Tian Bee [1988] 1 CLJ (Rep) 277 ***(cit)***
Re Beauchamp [1904] 1 KB 572 ***(cit)***
Re Hawkins [1895] 1 QB 404 ***(cit)***
Re Howell [1915] 84 LJKB 1399 ***(cit)***
Re Flatau [1889] 22 QBD 83 ***(cit)***

Legislation referred to:
Bankruptcy Act 1967, ss. 3(1)(i), 5(1)(c)
Bankruptcy Rules 1969, rr. 92, 95
Evidence Act 1950, s. 44
Rules of the High Court 1980, O. 13 r. 1

Other sources referred to:
Words and Phrases Legally Defined, Butterworths, 2nd Edn.
Williams' Law and Practice of Bankruptcy, Muir Hunter, 17th Edn.

For the Judgment Creditor - Cecilia Hwang Le Ching; M/s. Vincent Wong & Co.
For the Judgment Debtor - P.K. Lim; M/s. P.K. Lim & Co.

JUDGMENT

Syed Ahmad Idid JC:

In order to appreciate what this matter is all about, it is pertinent to state the following in chronological order:

15 September 1989 Judgment in default of appearance under O. 13 r. 1 was granted wherein it was adjudged that 1st defendant (the judgment debtor here) do pay the plaintiffs (the judgment creditor here) the sum of RM369,714.02 together with agreed interest at the rate of 12.5% per annum from 1 March 1989 to the date of full payment and legal fees on a solicitor-client's basis pursuant to the Advocates Remuneration Rules 1985 (Revised 1987) to be taxed.

31 October 1990 M/s. Vincent Wong & Co., submitted a request for issue of bankruptcy notice and on the same day, the notice was issued by the Senior Assistant Registrar, High Court Borneo, addressed to Chong Sew Jin @ Rose Chong Siew Jin. The particulars of the claim were as follows:

Judgment sum	RM369,714.02
Add: (i) Agreed interest at the rate of 12.5% per annum on the sum of RM369,714.02 from 1 March 1989 to 14 June 1990	RM 59,635.38
Less: Repayment made on 14 June 1990	RM 5,000.00
	RM364,714.02
Add: (ii) Agreed interest at the rate of 12.5% on the sum of RM364,714.02 from the 15 June 1990 to 31 October 1990	RM 17,361.39
Total interest charged from 1 March 1989 to 31 October 1990	RM 76,996.77
Balance Outstanding as at 31 October 1990	RM441,710.79

13 November 1990 Ricky Wong of M/s. Vincent Wong & Co., served Chong Sew Jin @ Rose Chong Siew Jin with a "true" copy of the bankruptcy notice "duly sealed" dated 31 October 1990. What then transpired?

16 November 1990 M/s. P.K. Lim & Co., filed (among others) (i) Notice of motion pursuant to rr. 92 and 95 of the Bankruptcy Rules 1969; and (ii) Affidavit on application to set aside the bankruptcy notice.

As can be seen, Rose Chong acted swiftly. She obtained the services of solicitors who then responded to the Court action.

It is clear, as is apparent from the face of the bankruptcy notice that the notice was founded on a judgment of this Court dated 15 September 1989 which the judgment creditor obtained against the judgment debtor. The judgment creditor purported to rely on an act of bankruptcy by the judgment debtor in the context of s. 3(1)(i) of the Bankruptcy Act 1967 with a view to subsequently presenting a bankruptcy petition against the judgment debtor pursuant to s. 5(1)(c) of the same Act if the bankruptcy notice is not resisted by the judgment debtor.

What does the judgment debtor require? She wants the Court to set aside the bankruptcy notice dated 31 October 1990 on the ground that it was founded on a judgment in default of appearance dated 15 September 1989 which was procured *ex parte* by the judgment creditor against the judgment debtor by fraud and so she added "the said judgment is therefore defective or irregular".

The evidence before the Court includes:

(i) Affidavit sworn by Borneo Housing Mortgage Finance Berhad's (or judgment creditor's) general manager, Lim Fong Mee, sworn on 30 January 1991;

(ii) Affidavit in reply by the judgment debtor dated 3 May 1991;

(iii) The affidavit sworn by judgment debtor on 16 November 1990 to support the notice of motion (which was to move the Court to set aside the bankruptcy notice) and which the judgment debtor claimed was "procured *ex parte* by the judgment creditor against the debtor by fraud". The solicitors for the judgment debtor argued on the notice of motion that the "said judgment (that is, the judgment in default of appearance) is therefore defective or irregular".

What are the events? According to the judgment debtor, she was shocked and surprised to have been served with the said bankruptcy notice which was issued by Messrs. Vincent Wong & Co., as advocates on behalf of the judgment creditor, for the following reasons:

(i) On the 6 July 1989, she duly approached the judgment creditor's office in which discussions were held with Messrs. David Lai, F.M. Lim and John Chong, directors and/or officers of the judgment creditor for settlement of the writ under suit no. K. 141 of 1989 including two other suits, namely suit no. K. 133 of 1989 and suit no. K. 119 of 1989, to be settled separately and not together;

(ii) In respect of Suit K. 141 of 1989, she offered to pay the judgment creditor RM100,000 as part-payment and the judgment creditor was to grant a loan. This offer was in consideration of the judgment creditor agreeing to withdraw the suit K. 141 of 1989;

(iii) The aforesaid offer was duly accepted by the judgment creditor wherefore particulars of the settlement reached between her and the judgment creditor were duly endorsed on the "service copy" of the writ of summons by one, John Chong, representing the judgment creditor which she brought along for the discussion;

(iv) Accordingly as advised by her solicitors, Messrs. P.K. Lim & Co., she believed that in the light of the above settlement for suit no. K. 141 of 1989, the judgment creditor had agreed to forebear to prosecute their claims against her and her other co-defendant;

(v) Her co-defendant who was also represented by Messrs. P.K. Lim & Co., duly filed his statement of defence on 14 October 1989;

(vi) On the 27 October 1989, the judgment creditor, through their solicitors, filed their notice of discontinuance of the suit against her co-defendant;

(vii) Further or in perpetuation of the judgment creditor's breach of the settlement, the judgment creditor re-commenced action against Ho Tsu Chet @ Jack under High Court Suit No. K. 39 of 1990 dated 5 February 1990 to recover the principal sum of RM400,649.90 alleged to be owing by her to the judgment creditor which has been increased from the previous sum of RM369,714.02 under suit no. K. 141 of 1989;

(viii) Her contention under (ii) above was fortified by para. 12 of Messrs. Vincent Wong & Co.'s letter to her solicitors dated 30 November 1989, in that she had until 30 September 1989 to effect payment of RM100,000.

(ix) However, on 15 September 1989, before the date due for payment, the judgment creditor prematurely entered judgment in default of appearance against her without her knowing and he has accordingly deposed to it.

Action in Court

The Counsel for the judgment creditor was quite unprepared and accordingly, the Court adjourned to enable Miss Cecilia Hwang to prepare her documents and submit. Mr. P.K. Lim of Counsel for the judgment debtor had prepared his submission in writing and handed it in with his bundle of authorities.

Contentions

As for the judgment creditor, their story is easy and simple. Their general manager, in his affidavit dated 30 January 1991 stated at paras:

> 3. The defendant had defaulted in her monthly instalment repayments since January 1986 and the plaintiffs had allowed her to repay the arrears by bi-monthly instalments of RM3,224 each commencing from May 1986. In December 1987, the bi-monthly instalments were reduced to RM3,141 each due to the reduction in the interest rate. However, the defendant had not been making regular payments and on 29 June 1989 the plaintiffs issued a writ of summons against the defendant and the guarantor.
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> 4. I have been informed by Mr. David Lai and Mr. John Chong who attended the meeting on 6 July 1989 that:
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> (a) The defendant agreed to pay the sum of RM100,000 from Toprise Sdn. Bhd.'s account when the loan they applied for has been approved.
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> (b) The defendant also agreed to make arrangements to pay the sum of RM141,870 being the arrears from the previous arrangement to pay by bi-monthly instalments of RM3,141 each.
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> 7. The plaintiffs decided that due to the non-supply of the documents and information by the defendant and/or Toprise Sdn. Bhd., the defendant had not shown her sincerity to settle the said suit. Furthermore, the defendant did not make any payments towards the arrears and after the lapse of two months the plaintiffs instructed their solicitors to resume litigation action against the defendant and the guarantor, Ho Tsu Chet @ Jack.
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> 11. On 10 November 1989, the plaintiffs' solicitors, Messrs. Vincent Wong & Co., wrote to the guarantor's solicitors, M/s. P.K. Lim & Co., to enquire whether they would receive the letter of demand on the guarantor's behalf. The plaintiffs had decided to issue legal action against the guarantor since the defendant had failed to pay the sum of RM100,000 as promised by the defendant for suit no. 141 of 1989. M/s. P.K. Lim & Co., replied on 14 November 1989 that they had instructions to accept service of the letter of demand and also the writ of summons should the plaintiffs decide to file one.

Submission on fraud

(i) The judgment creditor said that there was no proof of the project which judgment debtor had said would be undertaken. Mr. P.K. Lim, for the judgment debtor, cited "*Words and Phrases Legally Defined*" 2nd Edn. by Butterworths on:

Fraud

> The Court has never ventured to lay down, as a general proposition, what shall constitute fraud. Actual fraud arises from acts and circumstances of imposition. It usually takes either the form of a statement of what is false or a suppression of what is true.
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> 'Fraud', in my opinion, is a term that should be reserved for something dishonest and morally wrong, and much mischief is, I think, done, as well as much unnecessary pain inflicted by its use where 'illegality' and 'illegal' are the really appropriate expressions.
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> Fraud is conduct which vitiates every transaction known to the law. It even vitiates a judgment of the Court. It is an insidious disease, and if clearly proved spreads to and infects the whole transaction (*Jonesco v. Beard* [1930] AC 298 at pp. 301, 302).
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> The essence of the fraud ... charged is that advantage was taken of weakness, ignorance and other disabilities on the side of the respondent and the contract was derived from such behaviour and it is an unfair bargain. Lord Mardwicke said in *Earl of Chesterfield v. Janssen* [1715] 2 Ves. Sen. 125:
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> This Court has an undoubted jurisdiction to relieve against every species of fraud.
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> It appears by his judgment in that case that one species is getting bargains by taking surreptitious advantage of persons unable to judge for themselves by reason of weakness, necessity or ignorance. The word surreptitious would imply that the bargain was snatched. *Blomley v. Ryan* [1956] 99 CLR 362, per McTiernan J at pp. 385, 386.

(ii) Section 44 of the Evidence Act allows any party to a suit or proceedings to show that any judgment was obtained by fraud.

(iii) *Williams*' *Law and Practice of Bankruptcy*, 17th Edn. by Muir Hunter says:

> So also where the judgment was obtained by the compromise of an action, if the Court, after inquiring into all the transactions leading up to the compromise, can see that although not fraudulent it was unfair and unreasonable, the Court will not treat the judgment debt as a good petitioning creditor's debt, *Re Hawkins* [1895] 1 QB 404.

(ii) What the judgment debtor alleged was an agreement to forebear in that the meeting held on 6 July 1989 had agreed not to take up the proceedings against her. Obviously, according to Miss Hwang, the question should be whether there was a real debt or not and "Rose Chong did not deny that there was a debt". It is two years already since judgment was entered against the judgment debtor and she has not taken any steps to apply to set aside that judgment.

(iii) Mr. P.K. Lim concluded that "default judgment" (against his client the judgment debtor here) was clearly obtained without the knowledge of the other (meaning the judgment debtor). He therefore asked the Court to "invoke the powers to act suitably".

(iv) Mr. Lim in his usual candour and clarity of argument, asked the Court to

> ...invoke its power to enquire into the default judgment and to dismiss or set aside the bankruptcy notice but if considered together with the inherent weaknesses and faults in the judgment creditor's affidavit, it is even more compelling and cogent that the judgment creditor's bankruptcy notice should be dismissed or set aside with costs to be taxed, if not agreed.

(v) He urged the Court to:

> ..reject the debt as not being a good debt not only if there are circumstances tending to show fraud, or collusion or miscarriage of justice (see *Re Flatau*) but also if otherwise there was no real debt (see *Ex Parte Lennox*) and/or if, after inquiring into all the transactions between the parties leading up to the judgment, the Court can see that although the judgment was not obtained fraudulently, it was unfair and unreasonable (see *Re Hawkins*).

(vi) He added further that:

> ..the fact of the matter remains that the judgment debtor was not given a chance to defend herself before judgment was entered against her and it is wholly immaterial whether or not the judgment debtor did or did not deny the judgment debt as due and owing as alleged by the judgment creditor in para. 19 of its affidavit.

Conclusion

(i) First of all, there is no evidence that the judgment was based on fraud. The allegation that it was obtained without the knowledge of the judgment debtor does not turn a good judgment into one infested with fraud or even with fraudulent intent. The Court has to presume that the judicial and official acts in connection with that case have been regularly performed.

(ii) Was there a compromise? There was a meeting but even then and thereafter the judgment debtor was indebted to the judgment creditor and the debt was growing. The judgment debtor did not take any action to diminish her burden and the refusal or neglect to supply the information delayed the application for loan. Where in the world can banks or financiers consider applications for loans based on nothing? They require documents and they require information, data and often times even guarantees. If the applicant fails or refuses or neglects to respond with the information, as the judgment debtor had so displayed here, there was delay and if there is delay in approval, it cannot be the approving authority's fault based on such circumstances.

(iii) Rule 95 and Form 7 of the Bankruptcy Rules do not seem to help the judgment debtor here. The judgment debtor has to show one of three acts, that is:

1. That she has satisfied the judgment debt claimed;
2. That she has a counter-claim (or set-off or cross demand) being a sum equal to (or exceeding) the claim; and
3. That she could not have set up the said counter-claim (or as the case may be) in the action in which the said judgment was obtained against her.

(iv) There are several judgments which clearly spell out that the Court hearing the application to set aside the bankruptcy notice cannot go behind the judgment. These include *Sovereign General Insurance Sdn. Bhd. v. Koh Tian Bee* [1988] 1 MLJ 304, *Re Beauchamp* [1904] 1 KB 572 and *Re Howell* [1915] 84 LJKB 1399. The validity of the judgment debt will only be inquired into when there is evidence of fraud or collusion or miscarriage of justice; *Re Flatau* [1889] 22 QBD 83. In our instant case, the debt remains (and is growing) and the judgment remains good and intact. The judgment debtor has not satisfied the requirements of settling the debt or of having a counterclaim. The Court has to dismiss the judgment debtor's motion with costs.

Also found at [1991] 3 CLJ 2470